Supreme Court, U.S.
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No. 96-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

JAMES MESCALL, ET AL.,

Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

QUESTION PRESENTED

Whether the Fourteenth Amendment Due Process Clause prohibits a State from construing its common law so as to preclude a person from obtaining an effective remedy for the filing of a groundless report of child abuse and neglect with the state child welfare agency.

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PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel petitions for a writ of *certiorari* to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois court of appeals is unreported but is reprinted in the Appendix at 1a. The order of the Illinois Supreme Court denying Spiegel's petition for leave to appeal is also unpublished. It is reprinted in the Appendix at 14a.

JURISDICTION

On August 29, 1996, the Illinois court of appeals entered an Order denying Spiegel's petition for rehearing of that court's adverse ruling. On December 6, 1996, the Illinois Supreme Court

denied a petition for leave to appeal. App. 14a. On February 25, Justice Stevens extended the time for filing a petition for writ of *certiorari* in this Court to April 18; on April 16, he further extended that deadline to and including May 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT

This case arises out of a controversy between Marshall Spiegel and his upstairs neighbors, Minn Bobin and Loren Cherney, tenants of Respondent Mescall at Hollywood Towers Condominium. The dispute escalated into a physical confrontation, resulting in a criminal battery complaint being filed against Bobin and Cherney. Mescall subsequently filed a child abuse report with the Illinois Department of Children and Family Services (DCFS), claiming that Spiegel had used his infant child as a "human shield" in the confrontation, and that he had done so on other occasions in the past.

DCFS investigated Mescall's claims and found them to be groundless. Spiegel thereafter brought an action against Mescall for defamation, among other claims. Mescall admitted that he had made the defamatory remarks but asserted that the report was made in good faith. As an affirmative defense, he claimed that qualified immunity under the Abused and Neglected Child Reporting Act shielded him from civil liability. That statute provides, *inter alia*, that any person making such a report to

DCFS in "good faith" is immune from civil liability and further provides that "good faith shall be presumed." App. 5a.

Mescall filed a motion for summary judgment wherein he stated by affidavit that his "human shield" allegation was based on the version of the confrontation as related to him by his tenants, Bobin and Cherney. He further asserted that he notified DCFS in reliance on the "reputations of Bobin and Cherney for veracity." App. 5a. Spiegel filed his own affidavit in opposition to the motion for summary judgment. He denied that he had used his child as a human shield and alleged that Mescall made a false report to DCFS in retaliation for Spiegel's having previously reported Mescall and his tenants to the police in connection with the same incident.

The trial court granted summary judgment to Mescall, holding that a report of child abuse and neglect made to DCFS does not qualify as a "publication" for purposes of proving liability for defamation. On appeal, Spiegel urged that the trial court erred on this point. However, the Illinois court of appeals did not address Spiegel's argument in its opinion, instead affirming the trial court on different grounds.[1] Citing a lack of evidence as to "whether Bobin and Cherney in fact reported their allegations to Mescall," App. 7a, the court held that Mescall was entitled to rely on third party statements in making his report to the DCFS. The judgment of the court of appeals was entered on

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[1] While Spiegel did not cite the Fourteenth Amendment Due Process Clause in his briefs below as a reason for reversing the trial court's holding, the principle of fundamental fairness that is the essence of due process was clearly in play. This Court has recognized that the obligation to *adequately* raise federal claims in state court does not mean that such claims must be framed *perfectly*. "Our jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982).

May 30, 1996. Spiegel's subsequent petition for rehearing and petition for leave to appeal to the Illinois Supreme Court were denied.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to reaffirm that the relationship of parents and children enjoys protection under the ægis of the Fourteenth Amendment Due Process Clause. In particular, it poses the question whether a State may interpret the common law tort of defamation in a manner that, in effect, strips a parent who is the victim of a bad faith report of child abuse or neglect of an effective remedy for the infringement of his constitutional rights.

Here the trial court held that a report of child abuse and neglect made to DCFS did *not* constitute publication for purposes of determining whether Spiegel had met that element of his defamation cause of action. As a consequence, state law afforded Spiegel no effective remedy to obtain relief from the injury he suffered as a result of the bad faith report filed against him. Specifically, the lower court's holding denied him a meaningful remedy for the infringement of his fundamental right to carry on his relationship with his child free of unwarranted government intrusion.

This holding provides the ground for Spiegel's constitutional claim. He does not contest the State's interest in protecting children from neglect and abuse. On the contrary, he applauds the State's efforts to identify and punish those who victimize children. Spiegel urges only that the court's holding denies him due process by precluding him from obtaining an effective remedy for the injuries he suffered when Mescall made a groundless report to DCFS.

1. Ordinarily a judgment such as this one, deciding whether a plaintiff has proved the elements of a common law tort, lies beyond the purview of this Court. The federal Constitution generally leaves States free to define and apply their own common law without the intervention of federal courts. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that "[t]hat there is no federal general common law"). This rule, borne of due respect for the province of State authority, applies in the vast majority of instances. However, it is subject to certain qualifications.

A State may not construe its own law in a manner that denies its citizens an effective remedy for the vindication of their rights under the federal Constitution, including perhaps most fundamentally, the right to due process. Thus, it is well established that state procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process. *See* 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4025. Likewise, due process interests have been implicated in cases that center on the failure of a state court to provide a remedy for infringement of a federal right. *See, e.g., Ward v. Bd of County Comm'rs of Love County*, 253 U.S. 17 (1920); *see also Reich v. Collins*, 513 U.S. 106 (1994) (due process requires a "clear and certain" remedy for taxes collected in violation of federal law) (citing *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930) (due process violated when state court denied injunction against collection of unlawful taxes on basis of taxpayer's failure to pursue administrative remedies, where State's prior 'settled law' made clear that no such remedies existed).

In the instant case, the trial court's summary dismissal of Spiegel's defamation action fits precisely this pattern: A critical element of the offense of defamation is publication, yet the lower

court ruled that a report filed with the DCFS does not constitute publication, thereby precluding recovery under defamation for even bad faith reports.

2. The Fourteenth Amendment Due Process Clause provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. To claim the protection offered by the Due Process Clause a person must show that the State has deprived him of "interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). A long line of precedents establishes that "the relationship between parent and child is constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923)), as a liberty interest under the Fourteenth Amendment Due Process Clause. Indeed, the existence of a "private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), "has its source . . . not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

Spiegel's claim seeks to vindicate "the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state." *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1976). The DCFS inspection, which Mescall's report prompted, simply formed the means by which the State exerted such power.

Under Illinois law the only effective civil action by which an innocent parent may obtain an adequate remedy for a bad faith

report made against him to DCFS, is a defamation action. Most parents will be traumatized by a groundless report of child abuse or neglect, but few will suffer the discernible physical or mental maladies necessary to make out a prima facie case of intentional infliction of emotional distress. Although the Illinois Supreme Court has held that proof of mental and emotional injuries, without physical manifestations, may be sufficient to establish a claim for intentional infliction of emotional distress, *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), the *degree* of injury that one must prove to make out such a claim is a notoriously difficult standard. For this reason a grudging interpretation of the elements of defamation can deprive innocent parents of any meaningful remedy for the injuries they suffer at the hands of a bad faith reporter.

A false report of child abuse or neglect inevitably injures the innocent parents. If made in bad faith, a false report can be a formidable weapon. To be forced by a malicious neighbor to confront the entirely realistic fear that the State will take away one's child is no trivial injury. Even if the investigation is brief and the investigator is sensitive, the trauma of the possibility of losing one's child or the humiliation of an allegation of child abuse are substantial. Where a report is not only false but made in bad faith, due process requires a remedy for the parents who have been put to the pain, indignity and embarrassment of such an experience.

3. One can lay claim to the guarantees of the Due Process Clause, however, only if the challenged action can be fairly attributed to the State. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). This Court has "stated the rule in various ways, but at base, constitutional standards are invoked only when it can be said that the [government] is responsible for the specific conduct of which the plaintiff complains." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (O'Connor, J., dissenting)

(quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Whether the deprivation of a federal right may be fairly attributable to the State is determined according to a two-part test:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state, or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor [either] because he is a state official, or because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Lugar v. Edmunson Oil Co., Inc., 457 U.S. 922, 937 (1982). Mescall's report to DCFS meets both elements of this test.

First, Spiegel was deprived of enjoying his constitutionally protected relationship with his child, free from unwarranted government interference, because Mescall exercised a "privilege created by the state." *Id.* The Abused and Neglected Child Reporting Act provides the following:

> Any person, institution or agency, under this Act, participating in good faith in the making of a report or referral or in the investigation of such a report or referral . . . shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions. For the purpose of any proceedings, civil or criminal, the good faith of any persons required to report, or permitted to report, cases of suspected child

> abuse or neglect under this Act, shall be presumed.

325 ILL. COMP. STAT. 5/9. With this provision the Illinois General Assembly has thrown a cloak of immunity around any person who files a report of child abuse or neglect with DCFS. The deprivation at issue in this case is thus plainly linked to "the exercise of some right or privilege created by the state." *Lugar v. Edmunson Oil Co., Inc.*, 457 U.S. 937. Although that immunity is ostensibly qualified by the requirement of "good faith," as a practical matter its scope is unchecked because of the difficulty any targeted parent faces in attempting to prove the state of mind of the accuser. Moreover, in addition to the breadth of the immunity, the statute's legal presumption of the accuser's good faith places the burden of proving a negative on the person against whom the report was made. *Lehman v. Stephens*, 499 N.E.2d 103, 112 (Ill. App. Ct. 1986). Given the nature of the statutory immunity and Mescall's exercise of the privilege when he made his report against Spiegel to DCFS, it is indisputable that this case satisfies the first element of the *Lugar* test.

Second, Mescall is a state actor because he "acted together with" DCFS employees, who are state officials: Mescall made a report to DCFS, and DCFS employees initiated an investigation in response. Each played a necessary role. Had either Mescall or DCFS failed to act, Spiegel would have avoided the injuries caused by the groundless charges of child abuse and neglect. Indeed, even the text of the statute itself supports the interpretation that the legislature views one who files a report with DCFS as acting in concert with the agency. The statute describes such a party as "*participating* [with the state] in the making of a report or . . . in the investigation." This is merely another way of saying that "he has acted together with . . .state officials, or [that] his conduct is otherwise chargeable to the

state." *Lugar v. Edmunson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

Mescall's report to DCFS is thus "fairly attributable" to the State of Illinois for two reasons. First, that report constitutes the exercise of a privilege (in this case a generous immunity from suit) created by the Illinois General Assembly. Second, Mescall acted with DCFS employees when he made a groundless report of child abuse and neglect, to which DCFS responded by initiating an investigation. Accordingly, the necessary predicate exists for finding a violation of due process.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Ronald D. Maines
(*Counsel of Record*)
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W., Suite 900
Washington, D.C. 20037
(202) 223-2817

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FOURTH DIVISION
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No. 1-95-1184 and 1-95-2737 Cons.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARSHALL SPIEGEL, Plaintiff-Appellant, v. JAMES MESCALL, MINN BOBIN, and LOREN CHERNEY, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 93 L 7536 HONORABLE KATHY M. FLANAGAN, JUDGE PRESIDING.

MARSHALL SPIEGEL, Plaintiff-Appellant, v. HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION, Defendant-Appellee, and MINN BOBIN LOREN CHERNEY, Defendants.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 94 L 6465 HONORABLE GARY L. BROWNFIELD, JUDGE PRESIDING.

ORDER

The actions giving rise to these consolidated appeals stem from disputes among unit occupants at the Hollywood Towers Condominium. By all accounts, these disputes have escalated far beyond the petty bickering normally associated with condominium living. The plaintiff, Marshall Spiegel, has filed a number of actions in the circuit court of Cook County against the condominium association, several of its officers, and two tenants. In case 93 L 7536 (*Spiegel I*), the plaintiff sought recovery against the defendants Minn Bobin and Loren Cherney on theories of assault and battery, and against the defendant James Mescall on theories of assault and defamation. In case 94 L 6465 (*Spiegel II*), the plaintiff sought recovery against Bobin and Cherney on theories of malicious prosecution, defamation, and intentional infliction of emotional distress, and against Hollywood Towers Condominium Association (Hollywood) on theories of defamation and intentional infliction of emotional distress.

On August 31, 1994, the circuit court granted Mescall's motion for summary judgment on the defamation claim pending against him in *Spiegel I*. That case proceeded on the remaining claims until October 4, 1994, when the circuit court granted the plaintiff's motion for a voluntary dismissal pursuant to section 2-1009 of the Code of Civil Procedure (Code) 735 ILCS 5/2-1009 (West 1994)). In that same order, the defendants, Mescall, Bobin, and Cherney, were given leave to file motions for costs. On February 21, 1995, the court awarded Bobin and Cherney costs in the sum of $304 representing their appearance and jury demand fees. On March 1, 1995, the trial court disposed of *Spiegel I* with the denial of Mescall's motion for sanctions against the plaintiff brought pursuant to Supreme Court Rules 137 and 219 (134 Ill. 2d R. 137, 219). Thereafter, the plaintiff filed his notice of appeal from the order granting summary judgment in favor of Mescall on his defamation claim, and from the order

awarding costs to Bobin and Cherney. The appeal was docketed in this court as No. 1-95-1184.

On July 14, 1995, the trial court granted Hollywood's motion to dismiss the defamation and emotional distress claims pending against it in *Spiegel II* and made the order appealable pursuant to Supreme Court Rule 304(a). 134 Ill. 2d R. 304(a). The plaintiff appealed, and the matter was docketed before this court as No. 1-95-2737.

Since these matters arise out of the same operative set of facts, we consolidated the plaintiff's appeals. For the reasons which follow, we affirm.

Before addressing the issues presented by these consolidated appeals, we find ourselves compelled to comment on certain portions of the briefs filed by the plaintiff and Hollywood. The plaintiff filed a brief in this action which failed to contain any table of contents of the record on appeal as required by Rule 342(a). 134 Ill. 2d R. 342(a). As a consequence, we were required to sift through seven volumes of record in order to find those orders, pleadings and transcripts relevant to the issues before us. For its part, Hollywood, in clear violation of the provisions of Rule 341(e)(6) and (f) (134 Ill. 2d R. 341(e)(6), (f)), included a "Statement of Facts" peppered with argumentative phrases such as: "Despite plaintiff's herculean -- but wholly improper -- efforts to find a sympathetic judge for his meritless claim ***"; and "Unbelievably, Spiegel then filed a third action ***." We wish to remind the parties that the Supreme Court Rules are not advisory suggestions; rather, they are rules and should be followed. See *First National Bank of Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 603 N.E.2d 80 (1992).

Turning to the merits of the plaintiff's appeals, we first address the propriety of the summary judgment entered in favor

of Mescall on the plaintiff's defamation claim in *Spiegel I*, as our disposition of that issue impacts upon our decision on the plaintiff's appeal from the dismissal order entered in favor of Hollywood in *Spiegel II*.

Summary judgment is to be granted only when the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 1992).) Since the entry of a summary judgment is not a matter committed to the discretion of the trial court, we must independently examine the evidence presented to the trial court (*Arra v. First State Bank & Trust Co.*, 250 Ill. App. 3d 403, 621 N.E.2d 128 (1993)) and conduct a *de novo* review. *In re Estate of Hoover*, 155 Ill. 2d 402, 615 N.E.2d 736 (1993).

The defamation claim against Mescall in *Spiegel I* is contained in count IV of the plaintiff's amended complaint. In that count, the plaintiff charged that Mescall had a conversation with a representative of the Illinois Department of Children and Family Services (DCFS) on or about June 2, 1993, and falsely stated that the plaintiff had kicked Bobin or Cherney on May 29, 1993, while using his minor child as a "human shield." The complaint further charged that Mescall falsely informed the DCFS that the plaintiff had used his child as a "human shield" on more than one occasion.

In his answer to count IV, Mescall admitted that he made a report to the DCFS, but claims that the report was made in good faith. As an affirmative defense to count IV, Mescall asserted his qualified immunity from civil liability as contained in section 9 of the Abused and Neglected Child Reporting Act (Act) (325 ILCS 5/9 (West 1992)).

Section 4 of the Act authorizes any person having reasonable cause to believe that a child may be abused or neglected to make a report to the DCFS. 325 ILCS 5/4 (West

1992). Section 9 provides that any person making such a report in good faith is immune from civil liability, and further provides that good faith shall be presumed. 325 ILCS 5/9 (West 1992).

Mescall moved for summary judgment on count IV of the plaintiff's amended complaint in *Spiegel I*. The motion was supported by the affidavits of Bobin and Cherney, as well as Mescall's own affidavit. Mescall contended that Bobin and Cherney informed him of an altercation that had taken place on May 29, 1993, at the Hollywood Towers Condominium building. According to Mescall, he was informed that the plaintiff held his infant child in front of him as he kicked Cherney in the thigh. Mescall claimed that based upon the reputations of Bobin and Cherney for veracity, he concluded that the incident had occurred and that the plaintiff's infant child might be in danger of physical harm. He admitted to notifying the DCFS.

The plaintiff responded to the motion supported only by his own affidavit wherein he denied ever using his child as a "human shield" or kicking Cherney. The plaintiff went on to state his belief that Mescall made his false report to the DCFS in retaliation for the plaintiff having reported Mescall, Bobin and Cherney to the police on May 31, 1993.

Mescall's motion for summary judgment on the plaintiff's defamation claim was granted on August 31, 1994. The transcript of the proceedings before the trial court reveal that, although the court found disputed issues of fact on the questions of whether the plaintiff had used his child as a physical barrier and whether he kicked Cherney, the court found nothing in the evidentiary material before it which rebutted the statutory presumption that Mescall made his report to the DCFS in good faith. We agree.

In a defamation action, the question of whether a statement is conditionally privileged is one of law, but the question of whether the privilege was abused is a question of fact. *Kuwik v. Standard Star Marketing and Admn., Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129 (1993). The charging allegations contained in count IV of the plaintiff's amended complaint in *Spiegel I* make it clear that the defamation claim against Mescall was predicated solely upon statements made to the DCFS in connection with a report of child abuse. Consequently, the allegations of the plaintiff's own complaint were sufficient to give rise to the conditional immunity set forth in section 9 of the Act. 325 ILCS 5/9 (West 1992)). The relevant inquiry in this case is whether a genuine issue of fact exists on the question of Mescall's good faith in making his report to the DCFS.

As stated earlier, section 9 of the Act provides that good faith in reporting child abuse to the DCFS is presumed. We must address, therefore, the effect of that presumption in the context of a summary judgment proceeding.

The movant in a summary judgment proceeding is the burdened party. As such, it is not until the movant has come forward with evidentiary material which, if uncontradicted, entitles him to judgment as a matter of law, that the respondent is ever required to submit evidentiary material in opposition to the motion. *Kielbasa v. St. Mary of Nazareth Hospital*, 209 Ill. App. 3d 401, 568 N.E.2d 208 (1991). A movant can satisfy that burden by introducing evidence giving rise to a legal presumption which, if unrebutted, entitles the movant to judgment as a matter of law. In such a case, it is incumbent upon the respondent to come forward with evidentiary material to rebut the presumption in order to create an issue of fact and avoid the entry of a summary judgment. *Lehman v. Stephens*, 148 Ill. App. 3d 538, 499 N.E.2d 103 (1986).

Mescall did not rely solely upon the allegations of the plaintiff's complaint and the statutory presumption arising therefrom in support of his motion for summary judgment. As stated earlier, he filed the affidavits of Bobin and Cherney which state: 1) that at various times in 1993, the plaintiff approached both of them while holding his infant son in such a position as to create a physical barrier between them and the plaintiff; 2) that on May 29, 1993, the plaintiff, while holding his son in front of him, yelled at Cherney, "Go ahead and hit me" and then kicked Cherney in the thigh; and 3) that they reported these matters to Mescall. Mescall was an officer of Hollywood and the owner of the condominium unit in which Bobin and Cherney resided. In his affidavit, Mescall acknowledges that Bobin and Cherney informed him of the events alleged in their affidavits, and that he in turn reported the events to the DCFS.

The plaintiff submitted his own affidavit in opposition to Mescall's motion wherein he denied that the events set forth in the affidavits of Bobin and Cherney occurred. However, the plaintiff introduced nothing going to the question of whether Bobin and Cherney in fact reported their allegations to Mescall. Instead, the plaintiff stated his belief that Mescall made his false report to the DCFS motivated by a desire to retaliate against the plaintiff for previously filing charges against Mescall, Bobin, and Cherney with the police on May 31, 1993. Clearly, the plaintiff is incompetent to testify as to Mescall's intent. *Cunningham v. Addressograph Multigraph Corp.*, 87 Ill. App. 3d 396, 409 N.E.2d 89 (1980). Moreover, although the plaintiff contends that his wife informed Bobin and Cherney of his intent to report them to the police, he does not allege that Mescall was ever informed of his intention to make a police report or that Mescall was informed that such a report had been made prior to the time that Mescall contacted the DCFS.

Normally, issues of intent and motive are inappropriate for resolution by summary judgment. See *Hugo v. Tomaszewski*, 155 Ill. App. 3d 906, 508 N.E.2d 1139 (1987); *Palmateer v. International Harvester Co.*, 140 Ill. App. 3d 857, 489 N.E.2d 474 (1986). A defendant in a defamation action cloaked with a conditional privilege cannot ensure a summary judgment in his favor merely by introducing his own affidavit stating that he believed that his statements were true or that he acted in good faith. See *Costello v. Capital Cities Communications, Inc.*, 125 Ill. 2d 402, 532 N.E.2d 790 (1988). That is not to say, however, that motive or intent may never be resolved in a summary judgment proceeding when no genuine issue of fact exists on the question. See *Austin v. St. Joseph Hospital*, 187 Ill. App. 3d 891, 543 N.E.2d 932 (1989); *Fuentes v. Lear Siegler, Inc.*, 174 Ill. App. 3d 864, 529 N.E.2d 40 (1988). Additionally, the statutory presumption that Mescall acted in good faith distinguishes this case from the majority of cases which have addressed the propriety of entering a summary judgment when the motive or intent of the moving party is in issue.

In support of his argument that a genuine issue of material fact exists as to Mescall's good faith in making his report to the DCFS, the plaintiff contends that Mescall's failure to conduct an investigation into the allegations of Bobin and Cherney, combined with his delay in reporting the matter to the DCFS, created a reasonable inference that Mescall did not act in good faith. He argues that this inference is sufficient to rebut the statutory presumption of good faith and prevent the entry of summary judgment. We disagree.

The plaintiff correctly argues that a failure to investigate allegations of misconduct of which one has no personal knowledge can constitute reckless conduct which negates a claim of good faith. See *Girsberger v. Kresz*, 261 Ill. App. 3d 398, 633 N.E.2d 781 (1993). However, we are at a loss to determine what

further investigation Mescall could have undertaken in this case. The only individuals present during the altercation which formed the basis of Mescall's report to the DCFS were the plaintiff, his infant son, Bobin, and Cherney. Accepting the fact that the infant was not capable of providing any information on the matter, we are left with Bobin and Cherney, both of whom reported their allegations to Mescall, and the plaintiff, who denied that the event ever took place. Additionally, in his affidavit, Mescall states that Bobin and Cherney enjoyed a reputation for veracity. The plaintiff never challenged the foundation for that assertion before the trial court and introduced nothing to contradict it.

Relying on the holding in *Brown v. Farkas*, 158 Ill. App. 3d 772, 511 N.E.2d 1143 (1986), the plaintiff next claims that a delay in reporting child abuse to the DCFS can be corroborative of malice and a lack of good faith. Conceptually, we agree, but the facts in *Brown* are readily distinguishable from those in the case at bar. In *Brown*, the defendant delayed more than six months before reporting alleged sexual abuse of a child to the DCFS. *Brown*, 158 Ill. App. 3d 775-77. In contrast, Mescall made his report in this case some four days after Bobin and Cherney informed him of their altercation with the plaintiff. We find nothing in a four day delay under the circumstances of this case which could give rise to a reasonable inference of a lack of good faith on the part of Mescall.

A history of animosity between a child abuse reporter and the person reported may well give rise to an inference of a lack of good faith in the making of a report to the DCFS. However, in this case, there is no competent evidence of a history of animosity between Mescall and the plaintiff. To be sure, the plaintiff's counteraffidavit contains a reaffirmance of the allegations contained in count III of his amended complaint wherein he charges that Mescall assaulted him in the lobby of the condominium building on May 29, 1993, immediately after his

confrontation with Bobin and Cherney. But the plaintiff introduced no evidence which would support an inference that Mescall's alleged assault upon him was motivated by anything other than what he had been told by Bobin and Cherney.

We conclude, as did the trial court, that the plaintiff failed to introduce any evidentiary material rebutting the statutory presumption of Mescall's good faith in making his report to the DCFS. Consequently, we affirm the summary judgment entered in favor of Mescall on count IV of the plaintiff's amended complaint in *Spiegel I* based upon the immunity contained in section 9 of the Act.

Next, we address the propriety of the trial court's orders of February 21, 1995, and March 1, 1995, awarding Bobin and Cherney $304 in costs as a consequence of the plaintiff's voluntary dismissal of the remaining claims in *Spiegel I* on October 4, 1994. Although Bobin and Cherney have not filed briefs in this matter, the plaintiff's claimed error on this issue is easily decided. We will therefore address the issue on its merits. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 345 N.E.2d 493 (1976).

The plaintiff argues that the jury demand fee paid by Bobin and Cherney should not have been included in their recoverable cots because: 1) it was duplicative of the jury demand fee that had already been paid by the plaintiff; and 2) their jury demand was tardy. We disagree with the plaintiff's first argument, and the second has been waived.

Section 2-1009(a) of the Code provides that a plaintiff may, subject to certain specified restrictions, voluntarily dismiss an action "upon payment of costs." 735 ILCS 5/2-1009(a) (West 1992). However, only those items designated by statute can be taxed as costs. *Galowich v. Beach Aircraft Corp.*, 92 Ill. 2d 157,

441 N.E.2d 318 (1982). The clerk of the circuit court of Cook County is authorized to collect a fee for the service of a jury in civil actions to be paid by "the party demanding a jury at the time of filing the jury demand." 705 ILCS 105/27.2a (West 1992). Consequently, a jury fee is included within the meaning of the term costs as used in section 2-1009(a) of the Code. 735 ILCS 5/2-1009(a) (West 1992).

In this case, Bobin and Cherney filed a jury demand and paid a jury fee of $200 upon the filing of their counsel's appearance on January 12, 1994. The statute requiring the payment of a jury fee upon the filing of a jury demand makes no exception for circumstances such as the present case where a jury fee has already been paid by another party. See 705 ILCS 105/27.2a (West 1992). We conclude therefore that the jury fee paid by Bobin and Cherney was properly taxed as costs recoverable by them upon the plaintiff's voluntary dismissal of *Spiegel I*.

As for the plaintiff's contention that Bobin and Cherney filed a tardy jury demand and as a consequence their jury fee should not have been included as an element of recoverable costs, our review of the record indicates that this argument was never raised before the trial court and, thus, is waived on appeal. *Fawcett v. Reinertsen*, 131 Ill. 2d 380, 546 N.E.2d 558 (1989).

Based upon the foregoing analysis, we affirm the orders of the trial court entered in *Spiegel I* awarding Bobin and Cherney $304 in costs.

Lastly, we address the plaintiff's appeal from the dismissal order entered in favor of Hollywood in *Spiegel II*.

In count III of the plaintiff's complaint in *Spiegel II*, he sought recovery against Hollywood for defamation. A reading of

the count reveals that it is based upon the statements made by Mescall to the DCFS as set forth in count IV of the plaintiff's amended complaint in *Spiegel I* and predicated upon the doctrine of *respondeat superior* by reason of Mescall's status as an officer and director of Hollywood. Count IV of the plaintiff's complaint in *Spiegel II* purports to be an action for intentional infliction of emotional distress against all defendants, however, the count prays relief only against Bobin and Cherney. In any case, the charging allegations contained within the count are, as they relate to Hollywood, nothing more than an incorporation of the defamation allegations of count III.

On January 23, 1995, Hollywood filed its motion to dismiss counts III and IV of the plaintiff's complaint in *Spiegel II*, arguing, *inter alia*, that the claims pled in those counts were barred under the doctrine of *res judicata* by reason of the summary judgment entered in favor of Mescall in *Spiegel I*.

On February 22, 1995, the plaintiff responded to Hollywood's motion to dismiss arguing that since the order granting summary judgment in favor of Mescall remained interlocutory, the doctrine of *res judicata* was inapplicable.

On July 14, 1995, the trial court granted Hollywood's motion to dismiss and included Rule 304(a) language in its order. The plaintiff filed his notice of appeal on August 2, 1995.

Although the plaintiff filed a timely notice of appeal from the order dismissing counts III and IV of his complaint in *Spiegel II* against Hollywood, he has not addressed the propriety of the order in his brief on appeal. For this reason alone, the dismissal of these counts should be affirmed because issues not raised or argued before the appellate court are deemed waived. 134 Ill. 2d R. 341(e)(7); *Meyers v. Kissner*, 149 Ill. 2d 1, 594 N.E.2d 336

(1992). Even if the issue were not waived, however, we would still affirm the order of July 14, 1995, on its merits.

The law in Illinois is well settled that a final judgment for either the master or the servant, arising out of an action predicated solely upon the tortious conduct of the servant, bars a subsequent suit against the other for the same claim. *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 382 N.E.2d 1217 (1978). Suits are said to be brought upon the same claim when relief is requested on substantially the same set of operative facts. *Skolnick v. Martin*, 32 Ill. 2d 55, 203 N.E.2d 428 (1964).

Counts II and III of plaintiff's complaint in *Spiegel II*, as they relate to Hollywood, are predicated solely upon the tortious conduct of Mescall and are based upon the same set of operative facts which formed the basis of the plaintiff's defamation claim against Mescall in *Spiegel I*. Further, as of the date of the entry of the dismissal order in favor of Hollywood in *Spiegel II*, the summary judgment entered in favor of Mescall in *Spiegel I* was not only final, it was appealable.

For these reasons, we affirm the trial court's order of July 14, 1995, granting Hollywood's motion to dismiss in *Spiegel II*.

Affirmed.

HOFFMAN, P.J., with CAMILL and O'BRIEN, JJ., concurring.

ILLINOIS SUPREME COURT
81961 JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

December 4, 1996

Mr. Richard C. Leng
Leng Stowell Friedman & Vernon
321 South Plymouth Court, S#1400
Chicago, IL 60604

No. 81961- Marshall Spiegel, petitioner, v. James Mescall et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

Supreme Court, U.S.
FILED
JUN 4 1997
CLERK

No. 96-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

JAMES MESCALL and HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

JAMES MESCALL AND HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION'S JOINT BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

K. THOMAS STEVENS
(*Counsel of Record*)
STEVENS & ASSOCIATES
111 West Jackson Blvd.
14th Floor
Chicago, Illinois 60604
(312) 786-2244

Attorneys for Respondent James Mescall

HAL R. MORRIS
(*Counsel of Record*)
ALLAN GOLDBERG
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Attorneys for Respondent Hollywood Towers Condominium Association

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

LIST OF INTERESTED PARTIES

Petitioner has not separately provided a list of all parties to the proceeding in the court whose judgment is sought to be reviewed. Thus, to assist this Court, Respondents state as follows:

1. The Petitioner is Marshall Spiegel.

2. The Respondents are correctly identified in the caption as James Mescall and Hollywood Towers Condominium Association, an Illinois not-for-profit corporation.

3. This Brief in Opposition is filed on behalf of both James Mescall and Hollywood Towers Condominium Association.

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Respondents, James Mescall and Hollywood Towers Condominium Association, request that this Court deny the Petition for *Writ of Certiorari* seeking review of an unpublished Order of the Illinois Appellate Court, First District. The Appellate Court's Order appears in the Petition Appendix 1a-13a. The orders of the trial court are not reported. (Pet. App. 2a-3a).

STATEMENT OF JURISDICTION

The sole question advanced for review by the Petition was never presented to the Illinois courts. Thus, this Court cannot properly exercise jurisdiction over this case, pursuant to 28 U.S.C. §1257(a), because these newly presented arguments may not properly be considered by *Writ of Certiorari.*

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for *Writ of Certiorari.* For the most part, the Petition assails the Illinois judiciary's holding that Petitioner "failed to introduce any evidentiary material rebutting the statutory presumption." (Pet. App. 10a). As the Illinois Appellate Court's Order reveals, the touchstone of this case is not constitutional but whether Petitioner carried his factual burden of demonstrating "that a genuine issue of material fact exists." (Pet. App. 8a). Thus, the Illinois courts did not deny Petitioner's due process rights but, rather, entered judgment in favor of Respondents only after Petitioner failed to introduce "any evidentiary material" to create a genuine issue of material fact. Review of such

factual disputes are not an appropriate basis on which to grant *certiorari*.

Trial Proceedings And Disposition Of The Case Below.

The case now before this Court is, in fact, two separate matters filed in the Illinois trial courts and consolidated on appeal. The first case, number 93 L 7536, was filed against James Mescall alleging, *inter alia*, defamation. In that matter, the trial court granted summary judgment in favor of defendant on the defamation count. In ruling on that motion, the trial judge expressly recognized that Petitioner did not present any competent evidentiary material to establish the existence of a triable issue and observed that the defamation claim was "perilously close to a baseless count." Thus, the issue on appeal was limited to "whether a genuine issue of fact exists." (Pet. App. 6a). In ruling on that issue, the Appellate Court found Respondent "Mescall did not solely rely on the allegations of plaintiff's complaint and the statutory presumption [under the Illinois DCFS Act] arising therefrom in support of his motion for summary judgment." (Pet. App. 7a). Thus, the Appellate Court focused on the fact that "in this case, there was no competent evidence . . . and conclude[d], as did the trial court, that the plaintiff failed to introduce any evidentiary material rebutting the statutory presumption." (Pet. App. 9a).

While the motion for summary judgment in that matter was pending, Petitioner filed a second action, number 94 L 6465, against Hollywood Towers. In this second action, Petitioner incredibly alleged that the Association

was guilty of slander based upon the exact same statements allegedly made by Mescall. Because of the absolute identity between these two matters, the Illinois trial court dismissed this second defamation claim on the basis that the judgment in the first action wholly disposed of the case.[1] The proceedings in the Illinois courts make clear that Petitioner was *not* denied any constitutional guarantees but, rather, simply failed to carry his factual, evidentiary burden. Most telling, Petitioner does not cite to any part of the record suggesting otherwise. Consequently, as this Court does not hear factual disputes, it is inappropriate to seek *certiorari*.

REASONS FOR DENYING THE PETITION

I.

This Court Has No Jurisdiction To Consider Petitioner's Arguments.

This Court's review of judgments rendered by state courts is limited to circumstances where federal questions have been *both* raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (refusing to consider constitutional claims that were not raised or addressed below); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962) ("unbroken line of precedent" refusing to consider issues which the Petitioner

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[1] In addition, the Appellate Court recognized that Petitioner failed to address "propriety of the order [dismissing the Association] in his briefs and appeal." Thus, Petitioner has waived any claim of error he might have regarding the judgment in favor of the Association.

failed to argue in state court). Illinois law is consistent and similarly holds that arguments not presented and preserved in the trial court cannot be presented in the Appellate or Supreme Court. *Eagan v. Chicago Transit Authority*, 158 Ill.2d 527, 534 (1994).

Significantly, even the Appellate Court determined that Petitioner waived any claim of error. (Pet. App. 12a). Nevertheless, for the first time, Petitioner now argues that he has been denied his due process rights. Significantly, Petitioner never cited the due process clause to any Illinois court. That was, of course, despite the fact that he filed not one but two separate actions in the trial courts, presented briefs and arguments to the Illinois Appellate Court and even sought, unsuccessfully, leave to appeal to the Illinois Supreme Court. Most telling, however, Petitioner himself admits that he failed to cite to or argue that his due process rights were abridged. (Pet. p. 3, fn. 1). Thus, for this fundamental reason, Petitioner should not be permitted to seek review on such a specious constitutional ground.

II.

This Court Does Not Review Factual Issues.

Separate and apart from the fact that Petitioner's current argument has been waived, the Illinois court's decisions rest on the finding that Petitioner did not submit "competent evidence." Such a finding, especially by a state court, presents no issue deserving of this Court's attention. *See, Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *rehearing granted*, 337 U.S. 910 (1949), *adhered to in part, re-*

versed in part, 339 U.S. 605 (1950). Indeed, this Court's comments in *Graver* are telling: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of the very obvious and exceptional show of error." Here, not only is there no exceptional show of error, there was no error at all and Petitioner does not argue that there was. At best, this petition seeks review based on a factual disagreement. *Certiorari* to review factual determinations is not permitted.

III.

The Illinois Courts Did *Not* Compromise Petitioner's Right To Due Process.

Even if this Court were to look beyond the clear infirmities of the Petition for *Writ of Certiorari*, the Illinois courts did not compromise any right to due process. To the contrary, Petitioner is patently incorrect when he suggests that the Illinois courts somehow deprived him of "an effective remedy for the vindication of their [sic] rights under the federal constitution." (Pet. App. 5). All that the Illinois courts did was decide that the Petitioner failed to present competent evidence. Reference to the Illinois Appellate Court's decision is most telling. At the expense of brevity but in the hope of clarity, the Illinois court did not rely merely on the statutory presumption in the DCFS Act but, instead, ruled that "plaintiff failed to introduce any evidentiary material rebutting the statutory presumption." Thus, on its fact, the court did not abridge due process but, rather, recognized Petitioner's failure to create a triable factual issue.

CONCLUSION

Based on the foregoing reasons, Respondents respectfully submit that the *Writ of Certiorari* should be denied.

Respectfully submitted,

K. THOMAS STEVENS
(*Counsel of Record*)
STEVENS & ASSOCIATES
111 West Jackson Blvd.
14th Floor
Chicago, Illinois 60604
(312) 786-2244

Attorneys for Respondent
James Mescall

HAL R. MORRIS
(*Counsel of Record*)
ALLAN GOLDBERG
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Attorneys for Respondent
Hollywood Towers
Condominium Association

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No. 96-1763

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

JAMES MESCALL, *ET AL.*,

Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

REPLY BRIEF FOR PETITIONER

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

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ARGUMENT

Today, when the contours separating proper from improper state interference in the relationship between parent and child are a matter of substantial public debate, this case presents the Court with a most timely question. May a state interpret its common law tort of defamation so as to deny a parent who is the victim of a bad faith report of child abuse a judicial remedy for infringement of the parent's constitutionally-protected right to carry on his relationship with his child without unwarranted government intrusion?

Here, the trial court ruled that a report of child abuse made to DCFS did not constitute a publication for purposes of Spiegel's defamation action. The upshot of that ruling is deeply troubling. It means, in effect, that if a parent is the victim of a bad-faith report of child abuse and seeks vindication through an action for defamation, that remedy is futile *ab initio* for lack of the critical predicate of "publication." The State of Illinois therefore construed its law in such a way as to deny one of its citizens an effective remedy for violation of a constitutional right. Accordingly, this case falls under the rubric of due process jurisprudence involving the fundamental right to judicial relief and access to the courts.

In his petition, Spiegel showed that his case included the components of a valid Fourteenth Amendment Due Process claim. Specifically, he showed *(1)* that the familial interest at stake is one this Court has recognized to be constitutionally-protected, Pet. at 6; and *(2)* that the challenged conduct is attributable to the State and thus qualifies as state action. Pet. at 7-10. In their opposition, Respondents do not address either of these fundamental points. They respond with two different contentions, neither of which is availing.

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CASE.

Respondents argue that the Court lacks jurisdiction to review Spiegel's case because his due process claim is raised "for the first time" in the petition for *certiorari*. Br. Opp. at 4. This characterization, which goes both to the timing and the nature of the constitutional question, is incorrect.

With respect to the *timing* of Spiegel's claim, it is important to keep in mind the procedural context in which the claim arose. The trial court granted summary judgment for Mescall on the ground that a report of child abuse to DCFS does not qualify as a publication for purposes of proving defamation. Spiegel appealed the trial court's holding on that score. The Illinois court of appeals, however, did not address this issue. It upheld the trial court on the theory that Spiegel had not introduced sufficient evidence to rebut the statutory presumption that Mescall's report was made in good faith. The Illinois supreme court declined to review the case. Spiegel thus raised the issue whether the reporting of child abuse constituted a publication at the earliest opportunity, *i.e.*, before the trial court, and then repeated the argument in his papers to the court of appeals.

That the court of appeals ignored the issue does not, contrary to Respondents' assertion, deprive the Court of jurisdiction. The modern rule is that a federal claim cannot be considered by this Court unless it has been *either* raised in the state court *or* considered and resolved by the state court. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). Respondents' contention that "[t]his Court's review of judgments rendered by state courts is limited to circumstances where federal questions have been *both* raised and decided in the state court below," Br.

Opp. at 3, is thus incorrect. In sum, Spiegel's substantive claim was timely raised.

As to the *nature* of Spiegel's claim, the pivotal question is whether raising the publication issue directly put into play a constitutional question. It did.

The Court's precedents on this general point lay out a variety of circumstances in which it can be said that a federal question is extant. Among these are cases reflecting the Court's position that, where it is plain that the dynamics of due process have affected a lower court's decision, a properly raised federal question is present. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), the Court stated that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles." Similarly, in *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980), appeal jurisdiction was accepted over a state court ruling that did not expressly mention the federal Constitution but where appellants' response to a demurrer in the state trial court reflected that they were relying on a "federally protected right to life." In other words, because the Court has the power to inquire into the raising of a federal question, if the Court concludes that the federal question was necessarily decided by the state court, jurisdiction can be asserted. *Street v. New York*, 394 U.S. 576 (1969).

This pragmatic approach is wholly appropriate given the axiom that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "represent[s] a profound attitude of fairness." *Anti-Fascist Comm'n v. McGrath*, 341 U.S. 123, 162-63 (1941) (Frankfurter, J., concurring). Here, however, that fairness principle was abandoned. The trial court ruled that a report to DCFS did not constitute a publication for purposes of

a defamation action. The obvious consequence of that ruling was that Spiegel would be precluded from seeking a remedy for infringement of a constitutional right. That this consequence implicates due process could not have been any plainer to the trial court. The conspicuous purpose in litigating the publication issue was to establish that, indeed, Spiegel had the right to seek a remedy in the form of a state tort action. That is nothing less than the right to judicial process, a right that is indisputably of constitutional stature.

The integral relationship between the deprivation of a constitutional right and the subsequent opportunity to achieve a post-deprivation remedy for infringement of that right has been stated by the Court repeatedly. For example, in *Ingraham v. Wright*, 97 S. Ct. 1401 (1977), the Court considered whether corporal punishment in public schools violated the Eighth Amendment. Fundamental to the Court's disposition of the case was an assessment of the opportunity for a state law remedy in the event that punishment was found to be excessive. The majority followed the settled principle that 'what process is due' depends on "the private interest that will be affected," and "the probable value, if any, of additional or substitute procedural safeguards," *id.* at 1414 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, the trial court's ruling, which foreclosed Spiegel's defamation action, eliminated the availability of "additional or substitute procedural safeguards." *Ibid.*

A similar analytical approach has been applied in other fact patterns. For example, Justice Stevens has urged that it is the finding of a sufficient state court process to protect one's interest in his reputation (namely, a state action for defamation) that justified denial of relief to the plaintiff in *Paul v. Davis*, 424 U.S. 693 (1976). *See Ingraham v. Wright*, 97 S. Ct. 1427 (Stevens, J., dissenting). In *Davis*, a sheriff had distributed to local merchants a leaflet of "active shoplifters" which included

the name and photograph of the plaintiff Davis. Davis had been arrested for shoplifting but his case was later dismissed. He brought an action against the sheriff, alleging deprivation of a constitutional "property interest" in his reputation. The Court's rejection of Davis' claim should be understood, according to Justice Stevens, in light of Davis' viable option to seek a remedy —namely, a defamation suit against the sheriff in state court. State law did not grant the sheriff any privilege to defame, and there was no general law of defamation to which state officials were exempt. In short, there was a state procedure, a tort suit, available to remedy the deprivation of Davis' interest in his reputation. *Ingraham v. Wright*, 97 S. Ct. at 1427.

Applying this principle to the instant case dramatically illustrates the sense in which the constitutional issue was properly before the trial court. The cases noted above establish that the efficacy of a state court remedy to vindicate the deprivation of a constitutional right is key to assessing the due process implications of state action. Here, as in *Paul v. Davis*, the appropriate state court remedy was a tort action for defamation. But in our case that remedy was wholly foreclosed when the trial court ruled that making a report to DCFS did not constitute a publication for the purposes of a defamation action. In light of the significance that the availability of such a remedy has in the due process balance, the lower court's decision manifestly involved a "fundamental principle of judicial fair play" plainly sufficient "to alert the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. at 482 n.10. Because the constitutional implications of the trial court's ruling were that obvious, Respondents' contention that the Court lacks jurisdiction to review Spiegel's case is erroneous.

Finally, it should be noted that the prudential considerations underlying the Court's jurisdictional requirement

do not, contrary to Respondents' suggestion, cut against the finding of jurisdiction in this case. For example, the Court's general concern that the record below be sufficiently developed to permit intelligent review should not be heightened here. Spiegel timely raised the publication issue. That the court of appeals decided the case on other grounds and the Illinois supreme court denied Spiegel leave to appeal, were matters over which Spiegel obviously had no control and do not diminish the constitutional significance of the question raised. Nor is there a genuine risk that the question might have been "blocked" by the state court on adequate and independent state grounds, *see Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), inasmuch as Spiegel's due process right to obtain judicial relief for the constitutional infringement at issue is exclusively a federal question.

II. SPIEGEL'S PETITION PRESENTS FOR REVIEW A QUESTION OF LAW, NOT A MERE "FACTUAL DISAGREEMENT."

Respondents further contend that Spiegel's petition should be denied because this Court's "review [of] factual determinations is not permitted." Br. Opp. at 5. We are uncertain as to Respondents' precise point. It is correct, as discussed in the petition and *supra* at 1, that the Illinois court of appeals disposed of Spiegel's appeal on evidentiary grounds unrelated to the publication issue. That basis for the appellate court's decision, however, does not alter the essential fact that Spiegel timely raised the issue of publication. As noted earlier, contrary to Respondents' understanding, the modern rule is that the Court will not review a federal claim unless it has been *either* raised in the state court *or* considered and resolved by the state court. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). In other words, the rule envisages that an appellate court will sometimes

base its decision on a ground not raised on appeal, but that this should not preclude this Court's review of the federal question.

If, on the other hand, Respondents' contention is rather that Spiegel's constitutional claim is immaterial because it was unnecessary for the court of appeals to reach the publication question (the court of appeals having disposed of the appeal on evidentiary grounds), that would also be incorrect. If this Court grants review, decides the constitutional question in Spiegel's favor and remands, the lower court may ultimately rule a second time that Spiegel cannot defeat defendants' summary judgment motion. But because this Court will have established that Spiegel's risk of injury is of *constitutional* magnitude—that the absence of a remedy in defamation will deprive Spiegel of due process—we cannot assume at this juncture that the court of appeals would rule the same way. Indeed, because it is well established that summary judgment is a nearly impossible burden to discharge where constitutional rights are at risk, it is more likely than not that summary judgment would be denied. 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § CV 2732.2 (1996). For this reason, Respondents' objection to grant of the petition on this ground misses the mark.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Ronald D. Maines
(*Counsel of Record*)
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W., Suite 900
Washington, D.C. 20037
(202) 223-2817

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